FINANCE DOCKET NO. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
— CONTROL AND MERGER —
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP., AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Decision No. 90

Decided October 27, 2000

In this decision concerning UP/SP merger[1] conditions, we are denying a petition for reconsideration of our June 1, 2000, decision finding that the "contract modification" condition does not apply.

BY THE BOARD:

BACKGROUND

In our prior decision,[2] we found that AmerenUE's plant at Labadie, MO is a 2-to-1 shipper facility entitled to the services of The Burlington Northern and Santa Fe Railway Company (BNSF) under the omnibus clause of the BNSF settlement agreement that was imposed as a condition to our approval of the UP/SP merger in 1996. We also found that a particular contract that was significantly modified by agreement between AmerenUE and Union Pacific Railroad Company (UP) in April 1999 was no longer subject to the contract modification condition that permits shippers to modify contracts that were in effect when the merger was consummated (September 11, 1996) so as to make 50% of their traffic immediately available to BNSF. This condition was imposed not to protect shippers whose traffic was under contract with UP or SP but to "help ensure that BNSF has immediate access to a traffic base sufficient to

[1] *Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233 (1996) (*Merger Decision No. 44*).

[2] *See Union Pacific/Southern Pacific Merger*, 4 S.T.B. 879 (2000) (*Merger Decision No. 89*) which grants in part and denies in part a petition filed by Ameren Services Company on behalf of Union Electric Company d/b/a AmerenUE.

support effective trackage rights operations." *Merger Decision No. 44*, 1 S.T.B. at 420. In Decision No. 89, we held that the AmerenUE contract, as amended, "should not be regarded, for contract modification condition purposes, as the contract that was in effect at the time the UP/SP merger was consummated." *Merger Decision No. 89*, at 887. This means that whatever traffic AmerenUE has dedicated under contract to UP will not be available to BNSF until the contract expires at the end of 2001. AmerenUE filed a petition for reconsideration on June 21, 2000, and UP filed a reply on July 11, 2000.

DISCUSSION AND CONCLUSIONS

Having carefully examined the record and the arguments of AmerenUE, we continue to believe that the amended contract is in essence a new contract and that it does not qualify for the contract modification provision.

Petitioner argues that Addendum Three that was negotiated in April 1999 was merely a technical 3½-page addendum to a 43-page contract, and that UP bargained for and received benefits in this addendum. Petitioner also argues that this would not be construed as a new contract for purposes of Missouri law. It emphasizes boilerplate language included in the addendum indicating that "nothing herein contained shall be construed as amending or modifying the same except as herein specifically provided." AmerenUE claims that this language precludes the addendum from creating a new contract. Petitioner also argues that its contract modification rights cannot be deemed waived in the absence of a specific waiver provision in the contract addendum. Finally, petitioner urges that UP should not be permitted to profit from its failure to inform this shipper of its rights as a 2-to-1 shipper.

We continue to believe that Amendment Three was more than a technical amendment; it was major surgery resulting in a new contract for purposes of the Board's enforcement of the UP/SP merger conditions. As we noted in our prior decision, most of the relevant details of the addendum have been submitted under seal, and we are reluctant to reveal such details in the public record. Suffice it to say that UP agreed to rate reductions for this traffic, and it also agreed to extend this contract, which otherwise would have expired soon, for an additional year. Further, the parties agreed to modify other material terms of the contract. Although the addendum is only 3½ pages long, it clearly contains sufficient material changes to the prior contract so as to make it a new contract for our purposes.

The fact that UP bargained for and obtained important benefits in this new contract actually supports our finding that the parties reached a new bargain. AmerenUE also bargained for and obtained new benefits. There is no reason that

contract renegotiations need to be one-sided in order to result in a new contract. In fact, we would expect such renegotiations to be the exception rather than the rule.

Whether or not the addendum would be construed to result in a new contract for purposes of Missouri law is not relevant for our purposes. This case is governed by the Interstate Commerce Act as amended by the ICC Termination Act of 1995, not by Missouri law.[3] We have exclusive and plenary authority to see that our merger conditions are carried out as the Board intended, and we are exercising that authority here. 49 U.S.C. 11321-27.

The boilerplate language included in the addendum indicating that "nothing herein contained shall be construed as amending or modifying the same except as herein specifically provided" adds nothing to petitioner's case. It plainly does not indicate that the addendum may not be construed as resulting in a new contract. This language merely preserves, for the convenience of the parties, those contract terms that are not amended. This says nothing about whether the terms that were modified are substantial enough so as to constitute a new contract. As discussed above, the modifications clearly were substantial.

AmerenUE claims that its contract modification rights could not be "waived" unless a specific waiver condition was included in the contract addendum, and it would not have waived those rights. But, by the very fact of entering what is in essence a new agreement in April 1999, AmerenUE itself ended its rights to reopen the old contract that had been in effect in 1996 when the merger was consummated. And, whatever general intention petitioner might have had with respect to contracts in existence at the time of merger approval in 1996, it cannot fairly claim that it expected to retain the right to reopen a bargain struck in 1999, years after the merger was consummated.

Finally, we reject the notion that UP failed to adhere to our requirement that it notify AmerenUE of its status as a 2-to-1 shipper. In the Board's *Merger Decision No. 57*, served November 20, 1996, in this proceeding, we required UP

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[3] Moreover, it appears to us that petitioner's view as to Missouri law is unsupported. Recent Missouri cases we have reviewed indicate that the modification of a contract creates a new contract. *See Goldstein & Price, L.C. v. Tonkin & Mondl, L.C.*, 974 S.W.2d 543 (Mo. App. 1998); *E.A.U., Inc. v. R. Webbe Corp.*, 794 S.W.2d 679 (Mo. App. 1990). The two cases cited by petitioner are not on point. In the first, *Lowther v. Hays*, 225 S.W.2d 708 (Mo. 1950), the court merely stated in passing that the parties had modified an existing contract. The court did not explore the legal effect of this modification since the issue of whether this was still the original contract or whether it was a new contract was not posed in that case. The court in the second case, *Zumwinkel v. Leggett*, 345 S.W.2d 89 (Mo. 1961), did not rule on the question of whether a modification creates a new contract for purposes of Missouri law either. The court merely said that the parties may modify a contract orally, but had not done so in that case.

to inform shippers of our Decision No. 57 interpreting the contract modification condition. The Board made clear, however, that "[t]his notification requirement applies only with respect to those shippers that, in UP/SP's opinion, have contracts to which the contract modification condition is applicable." *See Merger Decision No. 57*, slip op. at 16 n.42. We imposed this requirement to ensure that all 2-to-1 shippers, not just those shippers such as AmerenUE who were parties to the UP/SP merger proceeding, would have notice of this opportunity. As should be clear from our former decision, UP did not believe at the time that AmerenUE was a 2-to-1 shipper for the purposes of this notice. UP had already entered a separate settlement agreement with AmerenUE that UP believed, incorrectly as it turns out, removed that shipper from the reach of the BNSF settlement agreement and the Omnibus Clause. Under these circumstances, we cannot say that UP breached any obligation to inform AmerenUE of its status as a 2-to-1 shipper. Moreover, AmerenUE is a sophisticated commercial party represented by counsel, and it surely was aware, or should have been aware, of the Board's decisions in this proceeding at the time it entered into this new agreement.

VICE CHAIRMAN BURKES, commenting:

I am voting to deny AmerenUE's petition for reconsideration of our *Merger Decision No. 89.* However, I continue to disagree with the conclusion that the contract modification condition does not apply to this contract. Since the contract was in effect when the merger was consummated, this condition should certainly apply to the terms of the original contract. I do not agree with the conclusion that Amendment Three to the contract was "major surgery resulting in a new contract." The amendment did not change the major terms of the contract, *e.g.*, parties, volume, origin, destination, etc. However, I would agree that there is question as to whether or not the condition should apply to the provision of the amendment which extended the contract period for one year. I also believe that it may be technically difficult to segregate other contract and amendment provisions.

It is ordered:

1. AmerenUE's petition for reconsideration is denied.
2. This decision is effective on October 3, 2000, the date of service.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn. Vice Chairman Burkes commented with a separate expression.